IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.722 of 2006
With
Civil Application No.271 of 2006

Shri Shankar Bayaji Patil
since deceased by his legal heirs:
Smt.Banubai Shankar Patil & ors. Appellants

Vs.

Shri Kisan Bapu Bhambure Respondent

Mr.S.P.Kadam for appellants.
Mr.Umesh Mankapure for respondent.

CORAM: B.H.MARLAPALLE, J.

June 27, 2007.

P.C.

1. Heard Mr.Kadam, the learned counsel for the appellants-defendants and Mr.Mankapure, the learned counsel for the respondent-plainitff.

2. The plaintiff had filed Regular Civil Suit No.153 of 1983 initially for perpetual injunction against the defendants in respect of the suit land located in Gat No.2651 admeasuring 4 Acres and 14 Gunthas of Kasegaon and 7 Anna 4 Pai share from the said land. As per the plaintiff by a Mortgage Deed at Exhibit 55 signed on 26/4/1968 the defendant no.5 had put him in possession of half share of the suit property i.e. 3 Anna 8 Pai and on 4/4/1969 by

signing another Mortgage Deed at Exhibit 56 the remaining half share of 3 Anna and 8 Pai was put in his possession and he was cultivating the total land. However, the defendant no.5 sold the suit land to the defendant nos.2 and 3 by registered sale deed dated 24/8/1982 (Exhibit 66) when the plaintiff was in possession of the said land. The plaintiff alleged that he was forcibly dispossessed sometimes in November 1982 though as per the Sale Deed at Exhibit 66 it was mentioned that the possession of the land was to be taken over after redemption and, therefore, he filed the suit for injunction initially and subsequently amended the suit seeking relief of possession as well. The suit was filed on or about 6th April 1983. The defendant no.5 filed Written Statement at Exhibit 21 and defendant nos.2 and 3 also set up a counter-claim. The defendant nos.2 and 3 stated that they have purchased the suit land for a consideration of Rs.35,000/- from the defendant no.5 and an amount of Rs.5000/- was paid to the plaintiff for redemption of the mortgage deed that was executed by the defendant no.5 in favour of the plaintiff and thereafter the defendants were put in possession of the suit land. In the counter-claim they prayed for directions to accept the mortgage amount deposited in

the Court and execute the deed of redemption in favour of the defendant nos.2 and 3 on or before 18th April 1994 failing which the defendant nos.2 and 3 may get it executed through the Court commissioner on application. This counter-claim was allowed while dismissing the Suit as per the judgment and order dated 18th March 1994.

3. The plaintiff, therefore, challenged the said preliminary decree passed by the trial Court in Regular Civil Appeal No.289 of 1999 and the learned Addl. District Judge at Islampur by his judgment and order dated 5th July 2003 was pleased to allow the appeal by setting aside the judgment and decree passed by the trial Court in Regular Civil Suit No.153 of 1983 on 18/3/1994. The suit to claim the relief of perpetual injunction came to be dismissed. However, claim for the relief of possession was decreed. The respondent nos.2 and 3 i.e. the present appellants were directed to deliver possession of the property in their occupation to the extent of 7 annas and 4 pai forthwith to the appellant-plaintiff. At the same time the counter-claim preferred by the present appellants was disallowed by setting aside the preliminary decree

passed by the trial Court in that behalf. This Second Appeal has been waiting for admission for the last about four years.

4. I have heard the learned counsel for the respective parties at length. Admittedly and as stated in the recital at Exhibit 66 i.e. Sale Deed dated 24/8/1982, the plaintiff was in possession of the suit land on that date and the defendant nos.2 and 3 were to obtain the possession only after paying an amount of Rs.5000/- to the plaintiff and by redemption of the mortgage deed on such payment. On the day the suit was filed i.e. on 6/4/1983 the plaintiff was not in possession of the suit land and he lost the possession in November 1982. The moot question before the Courts below was whether the plaintiff lost the possession of the suit land voluntarily or he was dispossessed forcibly and without redemption of the mortgage deed. The lower Appellate Court rightly considered the evidence of the plaintiff as well as the defendants. There is no documentary evidence to show that subsequent to the sale deed at Exhibit 66, the plaintiff received Rs.5000/- from defendant nos.2 and 3, the mortgage deed at Exhibit 56 was redeemed and he handed over

the possession of the suit land to the said defendants. On the contrary, it has come in the oral depositions of the respondent who entered the witness box that he was shown the 7/12 extract of the suit land at the time of cross-examination and he stated that he was aware that the plaintiff's name was recorded in the revenue record to the extent of 7 annas 4 pai as mortgagee. The contents of Exhibit 66 - sale deed were not disputed. He also admitted before the Court that he had not paid Rs.5000/- to the plaintiff before the possession of the suit land was taken over in November 1982. He also admitted that he had not acquired any order from any Court or any other legal forum to obtain the possession from the plaintiff. The plaintiff in his cross-examination admitted that the respondents obstructed him from possessing and enjoyment of the land. He instituted the suit but the respondents had succeeded in forcibly dispossessing him in November 1982. He also admitted that he instituted the suit after he was dispossessed. The lower Appellate Court was, therefore, right in holding that the plaintiff was forcibly dispossessed and the possession of the suit land was not received by the defendants voluntarily on redemption of the mortgage deed signed

between the plaintiff and the defendant no.5.

5. The next issue that has been considered by both the Courts below is regarding the counter-claim of the defendants at Exhibit 21. There is no doubt that to the said counter-claim, the plaintiff filed rejoinder at Exhibit 53. Mr.Mankapure, the learned counsel referred to the provisions of Order VIII Rule 6-A of CPC and submitted that the counter-claim was not maintainable as the defendants were already in possession of the suit land on the day the counter-claim was filed before the trial Court or much earlier thereto. On this issue regarding possession of the defendants from November 1982 over the suit land the parties agreed. The trial Court obviously fell in manifest error in observing that the plaintiff had received an amount of Rs.5000/- and handed over the possession of the suit land voluntarily. This finding is in fact contrary to the admissions of the defendants in the oral depositions as noted hereinabove and the trial Court itself recorded a finding that on the day the suit was filed, the plaintiff was not in possession of the suit property. On the face of these findings recorded by the trial Court, the counter-claim

submitted by the defendants could not have been entertained and, therefore, the lower Appellate Court rightly stepped in to correct the decree passed by the trial Court. The fact finding exercise done by the lower Appellate Court on the basis of the oral and documentary evidence placed before the trial Court does not involve any substantial question of law and, therefore, the second appeal must fail at the threshold.

6. The appeal is hereby dismissed in limine.

7. Civil application does not survive and the same stands disposed off.

(B.H.MARL